of course, must be added the special damages claimed, i.e., $1,800.

There will thus be judgment for the plaintiffs for $7,800. I shall hear Counsel as to costs.

After hearing argument I direct that plaintiffs receive two-thirds of their taxed costs.

As to damages, stay of execution for 14 days — if notice of appeal filed within that period — stay until hearing of appeal.

Order accordingly.

S. R. M. RAMAN CHETTIAR
v.
SOH BEK NEO & ANOR.

[Court of Appeal (Mathew, C.J. (F.M.), Sir Charles Murray-Aynsley, C.J. (Singapore), and Wilson, J.) July 24, 1952]

[Kuala Lumpur — Civil Appeal No. 22 of 1952]

Debtor and Creditor (Occupation Period) Ordinance 1948 — Notice required under s. 11(3) of the Ordinance — Whether notice is a necessary preliminary to action.

This was an appeal from the decision of the learned trial Judge who had dismissed the plaintiff-appellant's claim on the ground that the notice given under section 11(3) of the Debtor and Creditor (Occupation Period) Ordinance was invalid.

Held, (1) that where there was a dispute or difference between the parties recourse may be had to the High Court by Originating Motion or Summons without notice and in such a case no notice under section 11(3) of the Ordinance would be required; (2) that although the notice in this case was defective the respondents had by not raising any objection for two years during which time many active steps were taken in the litigation waived any right to object.

COURT OF APPEAL, appeal from the decision of Abbott, J., reported at p. 92 *ante*.

H. B. Ball for the appellant.

C. S. Jayaswal for the respondents.

Mathew, C.J., (F.M.) : — This appeal concerns a claim for re-instatement under section 11 of the Debtor and Creditor (Occupation Period) Ordinance, 1948. The claim was dismissed by the learned trial judge on the ground that the notice given under section 11(3) of the Ordinance was invalid. It was held that a notice to re-instate within one month was not in accordance with the express terms of section 11(3) which provides for a notice in writing within not less than one month I agree with the learned trial judge that the notice was defective. It is a matter for consideration whether the plaintiff's failure to serve a valid notice on the defendant entitled the defendants to judgment. In the special circumstances of the case I do not think it did. The notice to re-instate was sent to the defendant on the 7th October, 1949. The record does not disclose that any reply was sent to the plaintiff, and on 31st December, 1949, the plaintiff took out an originating summons. In January 1950 the defendants filed affidavits and denied liability. The point of the notice being invalid was not taken, and the matter went to trial. On appeal a re-trial was ordered, and at the opening of the re-trial on the 9th November, 1951, the point of an invalid notice was taken for the first time. In my view, the conduct of the defendants between the 7th October, 1949 and the 9th November, 1951 must be regarded as a waiver of the irregularity in the notice. They had joined issue on the merits of the case, and it was not competent for them at this late stage to rely on the defective notice as a defence. On this ground I would allow the appeal.

Whether a notice under section 11(3) is always a necessary preliminary to applying to the High Court by way of originating motion or summons for re-instatement requires consideration. Sub-section (1) creates a right, and sub-section (5) lays down the manner in which the creditor or the debtor or any interested party may apply to the Court for relief. It is clear from paragraph (c) that where any difference or dispute arises, recourse may be had to the High Court by originating motion or summons without any notice. If, for example, a letter were written demanding re-instatement, and a reply was received denying liability, no notice under sub-section (3) would be required, as a dispute or difference had arisen. Once a a dispute or difference has occurred, action can be taken. It was not, I think, the intention of the legislature that the rights conferred under sub-section (1) should be defeated by a technical defect in a notice given under sub-section (3). The purpose of the sub-section is to give a party reasonable time of not less than a month to comply with a request for re-instatement, and so avoid litigation.

I would allow the appeal with costs and order that judgment for the relief prayed be entered for the appellant with costs. The deposit in Court will be paid out to the appellant.

Sir Charles Murray-Aynsley, C.J., (Singapore) : — These proceedings arose out of a claim for reinstatement under section 11 of the Debtor and Creditor (Occupation Period) Ordinance, 1948. The proceedings had been protracted. On the 7th October, 1949 the appellant issued what purported to be a notice

under section 11(3) of the Ordinance. On December 31st of the same year the appellant took out an Originating Summons, and both sides filed affidavits. After an abortive trial the matter came before Abbott, J., on 9th November, 1951. There, for the first time, objection was taken to the notice of the 7th October, 1949. The case was heard, and on questions of fact the learned judge found in favour of the appellant but held that the notice was defective in that it did not give the required time to the respondents, and further held that this vitiated the whole proceedings and gave judgment for the respondents. I agree that the notice was defective, but it does not appear to me that this has the consequences which the learned trial judge assumed would follow.

The rights of the creditors are restored by sub-section (1) of section 11. Sub-section (3) is merely procedural. It affords the mortgagor or chargor an opportunity of doing what he is required to do without litigation, but where there is a disputed claim it serves no purpose. Sub-section (5) deals with procedure in disputed claims. This sub-section gives three sets of circumstances in which a mortgagee may proceed by way of an originating summons. One of them is where the mortgagor has not complied with a notice under sub-section (3). But para (c) reads "any difference or dispute having arisen regarding the reinstatement of any security under this section". This is clearly the case here. I think that once there is a dispute a notice under sub-section (3) is in no way obligatory. If in an undisputed case a mortgagee were to proceed by way of originating summons prematurely without issuing a notice, I think that the failure would be adequately dealt with by an appropriate order as to costs.

In any event, I think that a notice under sub-section (3) can be waived and that the respondents, by not raising any objection for two years, during which time many active steps were taken in this litigation, waived any right to object.

I think that the appeal should be allowed with costs, and the appellant given the relief he claimed in the Court below. The deposit in Court will be paid out to the appellant.

Wilson, J., concurred.

Appeal dismissed.

R. S. MOHAMED SULTAN v. LIAK JEE SONG.

[Orig. Civ. Juris. (Buhagiar, J.) July 26, 1952]

[Johore Bahru — Civil Appeal No. 5 of 1952]

Landlord and Tenant — Claim for possession — Res judicata.

This was an appeal from an order of the learned Magistrate of Johore Bahru giving judgment in favour of the plaintiff-respondent for possession of certain premises in Johore Bahru. One of the grounds of appeal was that the claim was barred by **res judicata** as the landlord had brought an earlier action for possession which had failed on appeal. It was also argued that as from the date of the exiry of the notice to quit on which the earlier suit was founded, the appellant became a statutory tenant and that he was entitled to remain in possession unless it could be shown that he had committed a breach of the terms of the tenancy agreement. It was alleged on behalf of the respondent that the appellant had committed a breach of the tenancy agreement as (a) that he had failed to comply with Clause 2 of the tenancy agreement which provided that if the lessor required the premises for his own use the lessee should surrender it at the expiration of one month's written notice (b) that he had failed to comply with Clause 3 of the agreement which provided that the lessee should not sublet the ground floor of the premises without the written consent of the lessor.

Held, (1) that the plea of **res judicata** could not be upheld because firstly the law to be applied in the present case was different from the law applied in the earlier suit and secondly there was a lapse of time between the earlier action and the present action; (2) that Clause 2 of the agreement was inconsistent with the provisions of the Control of Rent Ordinance, 1948 and could not be enforced; (3) that the breach of the agreement against subletting had been waived by the respondent's accepting rent from the appellant with full knowledge of the position and (4) that the appellant was entitled to remain in possession as a statutory tenant of the premises.

K. E. W. Hatchard for the defendant-appellant.

C. F. J. Ess for the plaintiff-respondent.

Cur. Adv. Vult.

Buhagiar, J. : — This is an appeal from an order of the learned Magistrate of Johore Bahru in Civil Suit No. 60 of 1950 giving judgment in favour of the plaintiff-respondent for possession of the ground floor of premises No. 36 Jalan Dhoby, Johore Bahru, occupied by the defendant-appellant.

The facts are as follows: Liak Jee Song, the respondent, is the tenant of premises No. 36 Jalan Dhoby, Johore Bahru. R. S. Mohamed Sultan, the appellant, became a sub-tenant of the ground floor of those premises, by virtue of an agreement dated the 5th June 2602 (1942) at a monthly rental of $40 on a month to month tenancy. This agreement included the following two clauses :—

"2. The said lessee hereby covenants with the lessor that in the event of the said lessor requiring the ground floor of the said premises for his own business or use, the lessee shall surrender and deliver up possession of the said premises to the lessor without any compensation whatsoever, at the expiration of one month's written